No. 88-1597 (6)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

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The continued uncertainty over the legal status of religious clubs in the public high schools described in the Petition for Certiorari, the briefs in opposition, and the various briefs amici, together with subsequent case law developments,[1] make the grant of a writ of certiorari appropriate in this case.

I. THE PETITION ACCURATELY DESCRIBED THE FACTS OF THIS CASE

Only one argument advanced by individual respondents calls for a response - the suggestion in Point I,B,

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[1] The petition for mandamus sought in Buffalo Bd. of Educ. v. Burr (Petition at p. 20, n.6) was denied. However, without opposition from the School Board, a state court subsequently entered a preliminary injunction requiring the School Board to allow a religious club to meet. Bd. of Educ. v. Burr, No. 11097/88 (Sup. Ct., Erie County 1989). The Ninth Circuit has twice modified its opinion in Garnett v. Renton Area School Dist., 865 F.2d 1121 (9th Cir. 1989), and is still considering a petition for rehearing en banc.

of their brief in opposition that, pursuant to Sup. Ct. R. 21.5, certiorari should be denied because petitioners "seriously misstate the facts of this case." Only two specific instances are cited, one relating to petitioners' position toward informal religious speech, and the other concerning impressionability of high school students. The evidence marshalled in support of the charge does not sustain it, for the Petition accurately summarized the record on both these issues.

A. The Informal Meetings Issue

Respondents claim that testimony [Brief in Opposition at 17], of Dr. Findley,[2] principal of Westside High

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[2] Respondents, relying on a caption in the trial transcript, mistakenly label this the testimony of Dr. Tangdall. An examination of the prior page, as well as the deposition itself, reveals that the disputed testimony is that of Dr. Findley.

School, that a non-sanctioned religious club would not be permitted to meet regularly in "one of the classrooms," contradicts the statement in the Petition (p. 6) that school officials were willing to tolerate informal religious meetings. The record belies that charge.

Dr. Findley did not testify that only religious clubs meeting regularly in a classroom would be banned; rather his testimony was that no non-sponsored student group, regardless of focus, could meet regularly in a classroom. Immediately after testifying that a non-sponsored religious group could not meet regularly in a classroom, there was the following exchange between Dr. Findley and respondents' attorney:

> Q. If the subject matter was what you would consider not religious, what would you do?

(Tr. 638).[3]

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[3] References to the trial transcript

A. If they regularly met in the classroom?

Q. Yes.

A. I would not let them meet.

Q. For what reason?

A. They wouldn't have a sponsor available. We do not have during our regular day meetings. We discourage kids meeting in open classrooms. We have study centers for them to go to because we do not have a sponsor person for them.

Far from being a content based rule against religious speech, the rule prohibiting regular meetings of unsponsored student groups in classrooms is a neutral "time, place or manner" restriction.

Individual respondents knew that school officials would not interfere with their informal religious meetings.

_____

are given as Tr. _____.

Respondent Mergens testified:

> Q. Miss Mergens, do you ever recall Dr. Findley [the school principal] or Dr. Tangdall [assistant superintendent of schools] having stated to you or in your presence that if you had just gone ahead and met and not said anything to anybody, that this whole thing wouldn't have happened and we wouldn't have a case here today or it wouldn't have gone as far as it had gone?
>
> A. Yes. Dr. Findley mentioned that to me. I don't know if it was a big formal statement or if it was just, "Well, if you wouldn't have said anything to us, it would be okay."
>
> Q. If you just hadn't said anything and gone ahead and met -- .
>
> A. Right.
>
> Q. -- some place in the school?
>
> A. Exactly.

Other witnesses, both students and administrators, testified to the same

effect, or that school officials made no effort to interfere with non-sponsored informal religious conversations. See, e.g., Tr. at 53-54, 67 (Mergens); 98 (Simmonds); 114, 122-23 (Kellison); 148 (Harris); 215-16 (Hilt); 295 (Findley); 426-27, 429-30 (Tangdall); 605, 621 (Findley).

To buttress their claim that non-sponsored informal religious speech was not permitted, respondents cite the testimony of the school's activities director, Dr. Huston. Supposedly responding to the question whether informal religious speech was tolerated, respondents quote Dr. Huston's testimony as [Brief in Opposition of 17] "I don't think it's [sic] probably appropriate for us as public school, nonsectarian to permit that." [Tr. 530-31].

A comparison of respondents' report of this testimony with the

transcript reveals that the "mis-statements" exist because the testimony has been wrenched out of context:

> Q. Do you recall in the deposition that I asked you the question, I said, "Question: the same situation, if they were to meet in the commons area during a free period and gathered together and sit around in a circle and freely discuss religious topics, maybe even have a Bible out and have somebody there, you know, sharing something from the Bible?"
>
> And your answer was:
>
> "Answer: I would probably recommend to the Principal that we wouldn't permit it. He would have to make a decision as to whether or not we would.
>
> Question: And what grounds would you recommend to the Principal that he not permit it?
> Answer: I don't think it's probably appropriate for us as public school, non-sectarian, to permit that." --
>
> (emphasis added).

The principal, Dr. Findley, made his own decision, rejecting Dr. Huston's

"recommendation" and informing Mergens that informal religious meetings were acceptable. In fact, Dr. Huston's deposition was introduced by respondents in order to demonstrate a conflict with his trial testimony to the effect that he would not interfere with informal religious activities during lunch, so long as they were not disruptive. [Tr. 528-53]

School officials drew a line between purely private speech -- which was permitted regardless of content -- and speech sponsored or sanctioned or reasonably understood as sponsored or sanctioned by school authorities -- which they prohibited, unless part of a program school officials wished to integrate into the curriculum. That is precisely the line this Court authorized school officials to draw in Hazelwood School

District v. Kuhlmeier, 108 S.Ct. 562 (1988).

B. The Impressionability Issue

The second supposed factual misstatement is said to be petitioners' suggestion "that the issue of impressionability remains open in this case." [Brief in Opposition at 18-19]. Nowhere do either the individual respondents or the United States challenge the accuracy of the summary of the testimony relating to this issue. And notwithstanding this Court's "two-court" rule on factual issues, the question of impressionability is hardly one of historical fact controlled by the "factual findings" below on this issue.

The question of impressionability, (which relates to the legal "effect" of the granting of recognition to student religious clubs) has not been treated by this Court as one of "historical fact"

subject to the clearly erroneous rule of F.R.Civ.P.52a, but as one of "judicial interpretation of social facts," open to plenary review. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). See also Edwards v. Aguillard, 107 S.Ct. 2573, 2577 (1987) Cf. Grand Rapids City School Dist. v. Ball, 473 U.S. 373, 390 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Roemer v. Bd. of Public Works, 426 U.S. 736 (1976).

Plainly enough, some courts, and several justices of this Court, believe that high school students are not so impressionable that they would confuse sanction of student religious clubs with school endorsement of religion. Bender v. Williamsport Area School Dist., 475 U.S. 534, ____ (1986) (Burger, C.J., dissenting); _____; (Powell, J. dissenting). But as demonstrated by the many

decisions in the lower courts refusing to uphold the "equal access" concept (and the innumerable decisions of this Court finding high school students impressionable for Establishment Clause purposes),[4] this is hardly a self-evident proposition.

What remains in this case then, are not factual disputes or misstatements of the record, but precisely the issues raised in the Petition: whether the Equal Access Act compels school officials to sanction a Christian Bible Club over their considered educational judgment that it is not suitable for integration into the public school curriculum, and whether, if it does, the Act violates the Establishment Clause.

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[4] See e.g., Edwards v. Aguillard, supra; Grand Rapids City School Dist. v. Ball, supra; Epperson v. Arkansas, 393 U.S. 97 (1968); PEARL v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).

These issues are presented clearly in this case, notwithstanding individual respondents' last minute efforts to obfuscate the factual record.

II. THE ISSUES SHOULD BE DECIDED NOW, NOT DEFERRED INDEFINITELY

The Solicitor General agrees that "this case presents important questions concerning both the meaning and the constitutionality of the Equal Access Act." Brief in Opposition at 6. He urges, however, that while review "may be appropriate," these issues "could profit from further development by the lower courts." We disagree.

Whether the equal access concept, enunciated at the college level in Widmar v. Vincent, 454 U.S. 263 (1981), ought to -- and can constitutionally -- be extended to the nation's secondary schools has been extensively debated in the case law, in the Congress, in various

public forums and in legal and educational journals, both before and after the Widmar decision. Hunt v. Board of Educ., 321 F. Supp. 1263 (S.D.W.Va. 1971); Trietly v. Board of Educ., 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (4th Dept. 1978); Johnson v. Huntington Beach Union H.S., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977). Whatever the impact the Equal Access Act has on the constitutional analysis it is not the sort of issue in which the practical experience of school administrators or of lower courts is likely to shed much additional light in view of the extensive public debate on this score. And the question of statutory interpretation is no more likely to be illuminated by the experience of the next five years than it has been in the five years that have elapsed since the Act's enactment. The statute exists; no regulations are

authorized or contemplated; the legislative history (to the extent relevant) is written and available; and the question ought to be decided.

The continued uncertainty about the constitutionality and meaning of the Equal Access Act leaves school officials in an unenviable position. Whichever way they turn, those disappointed by the decision can sue the school, alleging a plausible constitutional or statutory claim. Admittedly, the Equal Access Act is not a model of the legislative draftman's art, but there are only two possible approaches to the statutory issue presented here and they are illuminated by the decisions in this case and in Garnett v. Renton Area School Dist., supra.

The further development in the lower courts urged by the Solicitor is merely an invitation for school boards to

waste further human and financial resources in pursuit of an answer to the very questions before the Court now. Given that every school board in the country has more pressing demands on its resources than litigation -- and hardly needs the controversy religion clause litigation inevitably generates -- the Solicitor's invitation to encourage the diversion of those resources to yet more litigation just for the sake of creating more litigation should be declined.

Conclusion

For the reasons stated, the petition should be granted.

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